84-1513

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DANTE CARLO CIRACLO,
Respondent.

On Writ of Certiorari to the
California Court of Appeals
for the First District

****

BRIEF FOR THE CRIMINAL JUSTICE LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

****

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QUESTIONS PRESENTED

1. Whether aerial surveillance by police of a fenced residential yard constitutes a search under the Fourth Amendment of the United States Constitution.

2. If such activity does constitute a search, is it nonetheless permissible under the Fourth Amendment absent the existence of probable cause or a warrant.

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INTEREST OF THE CRIMINAL JUSTICE LEGAL FOUNDATION

The Criminal Justice Legal Foundation is a non-profit law firm organized to advance the citizenry's interest in a

system of criminal justice which accords full respect to their rights to the peaceful enjoyment of their lives, liberties and properties.

The law regarding search and seizure symbolizes, to the public mind, the plethora of technical rules of procedure promulgated to provide full respect to the rights of defendants without regard to the legitimate countervailing rights of victims and society. As a non-governmental advocate of these rights of the citizenry, the Criminal Justice Legal Foundation has a substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

The California Court of Appeal's decision in this case has failed to heed the lessons not only of Oliver v. United States 466 U.S. ____, 80 L.Ed.2d 214 (1984) but also of United States v.

Knotts 460 U.S. 276, (1983) and United States v. Karo 468 U.S. ___, 82 L.Ed.2d 530 (1984). Those cases demonstrate that the concern with privacy of a residence's curtilage, as compared to open fields (see Hester v. United States 265 U.S. 57 (1924)) is one of physical intrusion, as opposed to visual surveillance. Since aerial surveillance of the nature involved here, i.e., from a minimum height of 1000 feet, performed without use of enhancing devices, does not raise any issue of physical intrusion, the question of the sanctity of the curtilage never arises.

Having declared this surveillance a "search" the court then failed to engage in identification and balancing of the competing interests at stake. This process, is the fundamental core of Fourth Amendment adjudication. See

e.g., United States v. Brignoni-Ponce 422 U.S. 873 (1975), and United States v. Martinez-Fuerte, 428 U.S. 543 (1976). Even if the court were correct in defining the activity as a "search," an assessment of the weight of the public interest in eradication of domestic drug cultivation in comparison to this minimal form of intrusion upon respondent's privacy interests, leads to the conclusion that the surveillance is justified under the Fourth Amendment.

ARGUMENT

I

AERIAL SURVEILLANCE OF RESIDENTIAL AREAS DOES NOT CONSTITUTE A SEARCH WITHIN THE TERMS OF THE FOURTH AMENDMENT

A. Aerial Surveillance is a Form of Open Fields Observation.

This case involves unaided visual observation of a residential backyard from a height of 1000 feet. The resi-

dence is a tract home in a major metropolitan area not far from a full service commercial airport. There is no evidence of hovering, low-level flying, or utilization of advanced technologies such as satellite photography or computer assisted enhancement of photographic images. That this activity was found to be a violation of respondent's reasonable and legitimate expectations of privacy "betrays a mind-set more useful to those who officiate at shuffleboard games, primarily concerned with which particular square the disk has landed on than to those who are seeking to administer a system of justice whose twin purposes are the conviction of the guilty and the vindication of the innocent. .... Analyzed simply in terms of its 'reasonableness' as that term is used in the Fourth Amendment, the con-

duct of the investigating officers ... would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of ... Fourth Amendment jurisprudence." Florida v. Royer 460 U.S. 491, 520 (1983). Rehnquist, J., with Burger C.J. and O'Connor, J. diss..

The natural starting point for analysis is Oliver. Narcotics agents for the state of Kentucky, acting on a tip, went to Oliver's farm, drove past the farmhouse to a locked gate posted "No Trespassing" and walked around it. They passed a barn, then a camper from which someone shouted at them, and proceeded to a field of marijuana over one mile from the farmhouse. Oliver, supra, 466 U.S. at ___, 80 L.Ed.2d at 220-221. In the companion case the police received a tip marijuana was being grown

in the woods behind Thornton's house. They "entered the woods by a path between this residence and a neighboring house" id., at 221, and located marijuana.

In both instances the police trespassed on private property, passing by or within the curtilage of the respective residences. Nonetheless, the searches were held valid because "[T]he 'open fields' doctrine, first enunciated by this Court in Hester v. United States, 265 U.S. 57...(1924), permits police officers to enter and search a field without a warrant." Id. at 220, emphasis added. The "open fields" doctrine speaks then to physical entry onto areas outside the curtilage. This, of course, is what happened here when the police surveilled respondent's yard from the airspace over his property. The

doctrine is not directly concerned with visual observations made from such a vantage point. This is precisely the point upon which the court below, and respondent, in his Brief In Opposition To Petition For Writ Of Certiorari (hereinafter Opposition) suffer some confusion. Both speak as if it is observation of, rather than physical entry into, the curtilage, which constitutes a "search" under the Fourth Amendment. Yet this cannot be the case.

The statement of facts in Hester, supra, are somewhat sketchy, but indicate that revenue officers hidden 50-100 yards from a house observed an illegal sale of an alcoholic beverage at the door of the house, i.e., clearly within the curtilage. It was the determination that their vantage point was outside the curtilage which led the court to rule

that no "search" had occurred. In the words of Justice Douglas, writing for a unanimous court in Air Pollution Variance Bd. v. Western Alfalfa 416 U.S. 861, 865, (1974) "The Court in Hester v. United States, 765 U.S. 57, 59 ..., speaking through Mr. Justice Holmes, refused to extend the Fourth Amendment to sights seen in 'the open fields.'"

It is this distinction which lies at the base of the differing results reached in Knotts and Karo. In Knotts a beeper installed in a drum of chemicals had been monitored to its resting place outside a cabin. Visual observation of movement of the drum outside the cabin was then maintained by law enforcement officials. The court distinguished electronic monitoring that yields information concerning the inside of the cabin from instances where information obtained pertains to its outside.

Respondent Knotts, as the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned:

* * * *

But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open fields.' Hester v. United States, 265 U.S. 57 .... United States v. Knotts, supra, 460 U.S. at 282, emphasis added.

Granted, the choice of language in both Western Alfalfa and Knotts is ambiguous, and could be read, in the abstract, to refer to observations of things within, rather than from, open fields. Neither case will admit of such an interpretation within its factual context. In Western Alfalfa the observations were of chimney emissions in violation of air quality standards. There was no issue as to the category of the property upon which the chimneys stood - what was determinative was the observer's vantage point. "The field inspector was on respondent's property, but we are not advised that he was on premises from which the public was excluded." Western Alfalfa, supra 416 U.S. at 865. In Knotts the decisive point was that "[v]isual surveillance from public places along Petschen's

route or adjoining Knott's premises would have sufficed to reveal all these facts to the police." Knotts, supra 460 U.S. at 282.

That it is the position of the observer, rather than the observed, which is determinative of the existence of a search was made clear in Karo, which again involved electronic monitoring of chemicals via a "beeper." The significant question posed by that case for present purposes was "whether monitoring of a beeper falls within the ambit of the Fourth Amendment when it reveals information that could not have been obtained through visual surveillance." Karo, supra 468 U.S. ___, 82 L.Ed2d at 536. The answer: "For purposes of the [Fourth] Amendment, the result is the same [as an unwarranted surreptitious government agent's entry

into a residence] where, without a warrant, the government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house." Id. at 541, emphasis added. The rationale for this conclusion, and the distinction of Knotts, were stated in the following terms.

> The monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search, but it does reveal a critical fact about the interior of the premises that the government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. The case is thus not like Knotts,

> for there the beeper told the authorities nothing about the interior of Knott's cabin. The information obtained in Knotts was 'voluntarily conveyed to anyone who wanted to look...' [citation]; here, as we have said, the monitoring indicated that the beeper was inside the house, a fact that could not have been visually verified.
>
> Id. at 541-42.

Therefore, the question before the Court of whether or not a "search" occurred hinges upon whether the observations made by the police here were made from a position akin to that of the open fields, not whether the observed objects were located within respondent's curtilage. The only rational analysis equates open skies with open fields.

Not only can they not be equated with curtilage, but to do so would place greater constraints on a police officer occupying publicly accessible airspace than upon that same officer trespassing on posted, fenced private property to gain a visual vantage point of residential curtilage. Moreover, such an analysis would stand Oliver on its head. There it was noted that to deny the police the ability to traverse open fields would simply send them to the skies "to gather the information necessary to obtain a warrant or to justify warrantless entry into the property" Oliver, supra 80 L.Ed.2d fn 9 at 224. The logic of the opinion below would have the court order the police out of their aircraft in order to physically invade private property outside residential curtilage. "It is not easy to see

how such a requirement would advance legitimate privacy interests." Id. at 225.

To bolster his legal arguments respondent sets up a judicial domino theory - if we don't stop it here, "it is hard to find any basis for denying the overseers the right to high-powered gyroscopic binoculars and advanced optics photography to allow a detailed and leisurely scrutiny of whatever comes into view from the air." Opposition, supra at 8-9. While he admits there "are many answers to a parade of horribles" (id), we would advance only one.

> Respondent...expresses the generalized view that the result of the holding sought by the Government would be that 'twenty-four hour surveillance of any citizen of this country will be

possible, without judicial knowledge or supervision.'....But the fact is that the 'reality hardly suggests abuse,' Zurcher v. Stanford Daily, 436 U.S. 547, 566...(1978); if such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be appropriate. Ibid. Knotts, supra, 460 U.S. at 283-84.

B. Aerial Surveillance Violates No Reasonable Expectation of Privacy.

If the Court were to reject the constitutional similarity between open fields and open skies it is still the case that the surveillance at issue meets the requirements for a finding

that the "search" was "reasonable" in Fourth Amendment terms.

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." United States v. Jacobsen ___ U.S. ___, 80 L.Ed.2d 85, 94, fn. om.. This concept of reasonability is "critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities" for "a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered." Id., at 100. The test, then, is two pronged, asking first if there has been exhibited a subjective expectation of privacy, second, if that expectation is "justifiable," "reasonable" or "legitimate." See Hudson v. Palmer 468 U.S. ___, 82

L.Ed.2d 393, 402 (1984), Knotts, supra 460 U.S. at 280-81. These two prongs are not evenly weighted; "[t]he Court has always emphasized the second of these two requirements. ....'The analysis must...transcend the search for subjective expectations.... [W]e should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.' [Citation]" Hudson, supra, 468 U.S. ___, 82 L.Ed.2d 402, fn. 7.

The terms reasonable, justifiable or legitimate must be assessed in terms of the Fourth Amendment if they are to have any contextual grounding. The informative principle of the Fourth Amendment was recently described in the following manner. "The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed

'to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals' United States v. Martinez-Fuerte, 428 U.S. 543, 554... (1976)" INS v. Delgado ___ U.S. ___, 80 L.Ed.2d 247, 254 (1984). This necessarily leads to a balancing of interests, weighing the interest of society in the particular law enforcement objective at hand against the privacy interest of the person subject to official scrutiny. See e.g., Hudson, supra, 468 U.S. at ___, 82 L.Ed.2d at 403-04. Is the law enforcement objective significant; does the practice at issue further that interest in a manner otherwise difficult to achieve; how much of an intrusion into an individuals privacy does the practice constitute; is

the individuals privacy relatively inviolate absent the existence of the challenged practice?

The Court is already well aware of the interest of society in stemming the flow of illegal drugs into the underground stream of commerce.

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many

drugs...may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement. United States v. Mendenhall 446 U.S. 544, 561-62 (1980), Powell, J. conc.

The agricultural output of California is unmatched in the United States, yet marijuana is believed by many to be its most lucrative crop, worth an estimated $2 billion annually. Browning, F. Eyes In The Sky California Lawyer, p. 45, Aug 1985. In portions of the state an "avowedly outlaw subculture that enjoys wide local support" has developed. Id. at 46. Without aerial surveillance law enforcement officials would be unable to locate the small gardens scattered all over rural areas,

as well as those planted by cottage industry specialists such as the respondent. At present it is estimated that only 10 percent of the crop is located by officials. Id at 49. This reduces the situation to a "cat and mouse game" where growers sow their seeds and take their chances, according to one long time grower. Id. at 46. If the Court removes the threat of discovery by aerial surveillance it is signing over large portions of the state to marijuana farmers - not just the rural areas, but also thousands upon thousands of urban and suburban backyards where cultivation can be hidden from horizontal view with the use of fences, surrounding vegetation and the like.

The degree of intrusion upon privacy in this and similar cases is de

minimis. The record before the Court contains the photograph taken of respondent's residence by the police officer from his aerial vantage point. No scrutinizing of personal papers or effects is possible from the position represented by that photograph. The residence is surrounded by other houses. Its backyard is visible from trees on adjacent lots, as well as the roofs of several of those houses. It is safe to assume that roofers, T.V. antennae installers, children climbing trees, as well as utility persons with water, electric, gas and streetlight companies would, at various times, be in a position affording scrutiny of respondent's yard to a far greater extent than that allowed by unaided visual observation at 1000 feet.

More importantly, any person in the navigable airspace occupied by the police herein would be in a position to make the very same observations. Respondent lives in a town which is part of a major metropolitan area. Santa Clara is adjacent to San Jose, which possesses a full service commercial airport. A naval base, complete with air strip, exists at Moffett Field, several miles away. The neighboring cities of San Francisco and Oakland possess international airports. Radio stations in the area (e.g., KGO radio at 810 KHZ) provide traffic reports at commute hours, utilizing helicopters and airplanes to surveil ground activity.

Given all these factors, the intrusion upon respondent's privacy cannot be considered unexpected or unusual in any constitutional sense. There simply is

no reasonable expectation that his yard was beyond the field of view of large numbers of persons on any given day. "The general public could peer into the interior of [respondent's yard] from any number of angles; there is no reason [Schutz] should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy Katz v. United States, 389 U.S. 347, 361.... In short, the conduct that enabled [Schutz] to observe [respondent's yard] was not a search within the meaning of the Fourth Amendment." Texas v. Brown 460 U.S. 730, 740 (1983).

II

IF THE POLICE CONDUCT HEREIN DOES CONSTITUTE A SEARCH IT IS NONETHELESS REASONABLE ABSENT PROBABLE CAUSE OR A WARRANT

The majority in INS v. Delgado 80 L.Ed.2d 247 (1984) found "factory sweeps" by INS agents to constitute neither seizures of the work force in general, nor detention of those workers taken aside for brief questioning. There was in the majority's view simply no conduct possessing Fourth Amendment significance. The result is analogous to that profferred in the foregoing analysis. Justice Powell, however, wrote a concurring opinion which agreed with the result reached by the majority in spite of the fact he found a Fourth Amendment seizure to have occurred. His reasoning is fully applicable to the instant situation as an alternative

means of concluding Schutz's activity was legitimate.

Powell relied upon the analysis in Martinez-Fuerte in reaching his decision. Like Delgado, that case concerned the vexing problem of controlling the flow of illegal immigrants into the United States, and involved a balancing of the interests at stake. Unlike the first order balancing utilized to ascertain if in fact the Fourth Amendment is involved, this balancing tests admits the presence of the Fourth Amendment, but looks to weighing the reasonableness of the activity within its confines.

In Martinez-Fuerte the substantiality of the government's interest in stemming the influx was measured against the minimal intrusion of stops at check points "involving only a question or two and possibly the production of docu-

ments." Id. at 259. It was also significant the steps were public and regularized allowing field officers only limited discretion. Given those factors the Court held both initial stops and "slightly longer secondary inspection" were permissible absent even "individualized" suspicion "of the presence of illegal aliens." Id. Powell found factory sweeps to be correspondingly reasonable.

We have outlined above the enormity of the problem with drug cultivation in California. Unaided aerial surveillance from navigable airspace involves the most minimal of intrusions, much less in fact than either stopping cars at fixed check points or calling employees aside to question them at work. The police activity is nothing if not public, and vests little discretion in a police

officer to be abused, since he is confined to mere observation at a significant distance.

Given such minimal intrusion, and the fact that the conduct in issue is as unintrusive as possible, the scales which read "reasonable" in Martinez-Fuerte should be found to yield a similar determination here.

This analysis is consistent with the recent explication of this balancing rationale in New Jersey v. T.L.O. 469 U.S. ___ 83 L.Ed.2d 720, 731-32.

> To hold that the Fourth Amendment applies ... is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be rea-

sonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." Camara v. Municipal Court, supra, at 536-537.... On one side of the balance are arrayed the individuals legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

While Justice Blackmun concurred only in the result, believing the balancing test to be appropriate not as a

general rule, but only "when we [are] confronted with 'a special law enforcement need for greater flexibility' [citation]" (id. at 741, Blackmun, J. conc.), it remains that this is one of those special circumstances. Just as "a roving Border Patrol may stop a car and briefly question its occupants...based in part upon 'the absence of practical alternatives for policing the border' [citations]" (id.), a roving aircraft in navigable airspace may conduct ground surveillance for drug cultivation due to the lack of practical alternatives.

CONCLUSION

Drug abuse is a major social problem in the United States and aerial surveillance of the nature at issue here is a significant weapon in the war to halt such abuse. On August 5, 1985, the

federal government, in cooperation with all 50 state governments, initiated a campaign to locate illegal crops throughout the nation, making use of helicopters and airplanes to locate areas of cultivation. This campaign stands as an acknowledgment by all sovereign authority in the United States that such tactics are necessary and proper tools in the drive to eradicate drug abuse. Given a) the lack of any intrusion upon a reasonable expectation of privacy, or alternatively, b) the de minimis nature of any such intrusion should the court determine one exists, it must be concluded that the police activity complained of by respondent passes constitutional muster.

DATED: August 8, 1985.

Respectfully submitted,

CHRISTOPHER N. HEARD,
Legal Director

By C.N. Heard
CHRISTOPHER N. HEARD

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

CERTIFICATE OF SERVICE BY MAIL

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Petitioner,	)	No. _____
v.	)	
DANTE CARLO CIRAOLO,	)	
Respondent.	)	

State of California)
)
City and County of Sacramento)

CHRISTOPHER N. HEARD, a member of the Bar of the Supreme Court of the United States, being duly sworn, deposes and states:

His business address is 660 "J" Street, Suite 280, in the City and County of Sacramento, State of California; that on August 8, 1985, true copies of the enclosed Brief of Amicus Curiae in the above-entitled matter were served

on counsel of record by placing same in envelopes addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
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Clerk, Santa Clara Superior Court
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Said envelopes were then sealed and deposited in the United States mail at Sacramento, California, with first class postage thereon fully prepaid.

C W Heard

CHRISTOPHER N. HEARD

Legal Director
Criminal Justice Legal Foundation

Dated: August 8, 1985.

OFFICIAL SEAL
KIMBERLY M. SCOTT
NOTARY PUBLIC-CALIFORNIA
SACRAMENTO COUNTY
MY COMM. EXPIRES DEC. 11, 1987

Kimberly M. Scott

(NOTARY PUBLIC)

Notary Public in and for the State of California, City and County of Sacramento, personally appeared CHRISTOPHER N. HEARD, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same.